



# DEPARTMENT OF JUSTICE

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## ANTITRUST IN THE EARLY 21<sup>ST</sup> CENTURY: CORE VALUES AND CONVERGENCE

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Presented at the  
Program on Antitrust Policy in the 21<sup>st</sup> Century  
Sponsored by the Directorate General for Competition at the European Commission  
and  
the U.S. Mission to the European Union  
Brussels, Belgium

May 15, 2002

It is a pleasure for me to be here in Brussels today, at the gracious invitation of my friend, Commissioner Mario Monti. I want to thank our distinguished Ambassador to the European Union, Rockwell Schnabel, for his generous hospitality, and the several organizations that have assisted in putting this event together. I hope that my remarks this morning will be worth the effort that they have invested.

The state of international antitrust enforcement in the early 21<sup>st</sup> century is governed by three hard facts: First, as economic creatures (individual and corporate), we live in a global economy. Second, as citizens, we are governed by a multitude of national and regional governments. And third, facts one and two will prevail for the foreseeable future. Antitrust is not very different in this respect from many other areas of law -- tax and securities law are obvious examples -- but the very success of the free market message in the last 15 years has spawned a multiplicity of national and regional antitrust regimes, nearly 100 in all, with roughly 65 of those requiring premerger notification. In one sense, we should be heartened by this development, for it shows that countries all over the world are betting on competition to increase the efficiency of their producers, to deliver lower prices and better quality to their consumers, and to act as an engine of innovation and economic growth. But the assertion of overlapping antitrust jurisdiction by multiple sovereigns has the potential to harm the very competitive values that antitrust is meant to protect.

Those of us charged with enforcing the antitrust laws have an obligation to begin now to address the issues posed by multijurisdictional enforcement. In my time with you this morning, I will discuss why we need to address the risks to the global economy posed by conflicting and divergent antitrust enforcement, even though many of those risks have thus far been mitigated on

a Transatlantic basis by the cooperative and productive relationship between the U.S. and EU antitrust agencies. I will then discuss the evolution of antitrust law in the United States and the European Union, respectively, to show how the law and enforcement policy in both jurisdictions increasingly has come to focus appropriately on economic efficiency and consumer welfare goals, and how the continuing convergence of substance and process in the U.S. and EU provides lessons for addressing these issues on a global basis. Finally, I will discuss how the new International Competition Network and other multilateral initiatives have the potential to improve significantly the quality of international antitrust enforcement in a wide range of areas, especially merger review.

## **I. The Problems Posed by Multijurisdictional Merger Enforcement in the Global Economy**

I begin this discussion with two premises: that sound antitrust enforcement, including sound merger enforcement, is a good thing, and that it is a good thing, not only for the United States and the European Union, but for consumers and producers around the globe. The difficulty we face is how to accommodate the legitimate interests of jurisdictions in antitrust matters that affect their economies with the interests of businesses and consumers in not having antitrust enforcement used as a tool of industrial policy, protectionism, rent-seeking, or worse. This is especially true in merger enforcement, where multinational transactions often involve contemporaneous reviews by multiple antitrust authorities.

There are three basic risks posed by multijurisdictional merger review. First, there is a risk that the cost, complexity, and sheer uncertainty of having to comply with 15 or 20 or 30 different merger regimes, with different information requirements and different time schedules, will kill

some efficiency-enhancing deals of global scope, and cause others not to be attempted -- to the disadvantage of consumers all over the world. This one is sufficiently obvious as not to require further elaboration. Second, there is a risk that different reviews may yield different results. Now, different results are not objectionable where the relevant economic facts are different in different jurisdictions (there are, after all, still regional, national, and local markets); or where the relevant facts and core values are the same, and there is merely a good faith difference of view on close cases. More serious issues are raised, however, where differences arise because the legal standards or analytical processes are significantly different. The divergence between the United States and the European Commission in last year's *GE/Honeywell* merger case illustrates this problem.

Finally, and most seriously, there is the significant risk that economic nationalism will prevail in antitrust merger enforcement in some jurisdictions, with the accompanying politicization of enforcement. Antitrust is, or should be, focused on protecting competition, not competitors. As one of my predecessors, Thurman Arnold, said 60 years ago: “[t]he economic philosophy behind the antitrust laws is a tough philosophy. [Those laws] recognize that competition means someone may go bankrupt. They do not contemplate a game in which everyone who plays can win.”<sup>1</sup> Or, as our Supreme Court explained much more recently: “[t]he purpose of the [Sherman] Act is not to protect business from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition

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<sup>1</sup> *Quoted by Jack Brooks, Address at Symposium in Commemoration of the 60<sup>th</sup> Anniversary of the Establishment of the Antitrust Division (Jan. 10, 1994).*

itself....”<sup>2</sup>

This is not a core value that will commend itself to every jurisdiction in every circumstance. As the economic stakes grow ever larger, firms are naturally driven to seek protection and help from their governments; they can be expected to try to use antitrust as a weapon to be wielded against their opponents, foreign and domestic. This is a problem faced by new agencies and old. But in multijurisdictional merger review, it is the most restrictive agency decision that may prevail, as my colleague, FTC Chairman Tim Muris, explained late last year.<sup>3</sup> The potential economic consequences of antitrust law meaning one thing in one jurisdiction and something quite different in another are enormous. And if the public and the international business community find that merger decisions around the world are being made based, not on sound, consumer-welfare-based, economic theory, but on the basis of local interest buttressed by dubious economic and social theories unencumbered by economic evidence, then public support for sound antitrust enforcement necessarily will falter, and the global economy will suffer.

## **II. These Risks Have Been Mitigated by the US-EU Antitrust Relationship**

Fortunately, these risks of multijurisdictional enforcement thus far have been significantly mitigated by the good working relationship forged over the past decade between the U.S. and EU antitrust agencies. It would be difficult to overstate the importance of the relationship between the United States and the European Union in a wide variety of areas, and I

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<sup>2</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993).

<sup>3</sup> Timothy J. Muris, “Merger Enforcement in a World of Multiple Arbiters,” “Brookings Institution Roundtable on Trade and Investment Policy (Dec. 21, 2001).

believe that the United States and the European Union, together, have a special duty to serve as a model of a sound working partnership in antitrust enforcement for the rest of the world. The foundation of our relationship is the antitrust cooperation agreement that the U.S. and EU signed in 1991, under the leadership of then-Assistant Attorney General Jim Rill on the U.S. side and Sir Leon Brittan (as he then was) on the European side. Over the years, this agreement has undergirded progressively better cooperative ties between the U.S. and EU agencies.

In the merger area, the Justice Department has worked closely with the EC on numerous high-profile mergers, such as *WorldCom/Sprint* and *Alcoa/Reynolds*, aided by waivers by the parties of their confidentiality rights, and the FTC has done so as well, in cases like *Boeing/Hughes* and *Air Liquide/Air Products/BOC*. On the cartel side, confidentiality constraints have limited our ability to work together to as great an extent as in merger cases, but the Division and the Commission still have been able to do important cooperative work in such cartel cases as *Graphite Electrodes* and *Fine Arts Auctions*. In the course of all this cooperative work, the U.S. and EU agencies have learned much from one another, which has led to improvements in antitrust enforcement on both sides of the Atlantic.

Of course, life is not all peaches and cream. Interspersed among all this beneficial merger and cartel cooperation are the odd *Boeing/McDonnell Douglas* and *GE/Honeywell* cases, which serve as powerful reminders that the U.S. and EU antitrust agencies still have much to do to promote sound convergence among our respective enforcement regimes. This is a job that all of us take very seriously. Indeed, the *GE/Honeywell* debate itself has made an important contribution to convergence in merger review. At one point during that debate, I believed that the case demonstrated “a simple, but rather fundamental, doctrinal disagreement over the

economic purposes and scope of antitrust enforcement. What led the U.S. to clear the transaction -- the prospect that it would make the combined firm a more effective competitor -- was the very reason the EU opposed it.”<sup>4</sup> But the Commission now has made it clear, even to us, that it shares our view that the ultimate goal of antitrust policy must be consumer welfare, and that it views merger-generated efficiencies positively and will not challenge a merger just because it creates a more efficient firm.

That said, there are many areas in which we and the Commission can learn more from one another and encourage an evolutionary procedural and substantive convergence. I believe that our common experience in *GE/Honeywell* has reinforced for antitrust officials on both sides of the Atlantic the value of close consultation on cases, and of full and frank discussion of antitrust issues in a variety of fora. Antitrust people believe in markets, and we believe that if we lay out our wares in the marketplace of ideas, the market will provide sound guidance on theory and practice. In order to take our relationship to a more substantive plane, Commissioner Monti, Chairman Muris, and I agreed last Fall to reinvigorate our existing joint merger working group, a subject to which I will turn in a moment.

### **III. The Development of the United States’ Focus on Competition and Efficiency**

#### **A. The Evolution of Antitrust in the United States: Flexibility and Openness**

So our relationship with the EU continues to evolve, as does substantive antitrust enforcement on both sides of the Atlantic. Indeed, evolution has been the common coin of

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<sup>4</sup> Charles A. James, “Reconciling Divergent Enforcement Policies: Where Do We Go from Here?,” Speech at the Fordham Corporate Law Institute (Oct. 25, 2001).

antitrust law throughout its history. The U.S. antitrust laws have been on the books for more than a century, and in that time, the views of antitrust enforcers, practitioners, and judges have evolved dramatically. At the beginning of the 20th Century we were faced with the fundamental difficulty of interpreting the Sherman Act, because it could not possibly apply as broadly as its language suggests. This led to the development of the Rule of Reason and the *per se* rule of illegality for certain arrangements. Beginning in the 1950's we were confronted with the task of making sense of the Clayton Act and its implications for merger enforcement. The 1960's brought the Great Structural Age of antitrust law, followed by the introduction of greater economic rigor into antitrust analysis in the 1970's and 1980's. Over the past decade, we have seen the dawn of the so-called "New Economy," with some observers questioning the proper role of antitrust enforcement in this "better, faster, high-tech" world.

It is only through a continuous dynamic process of questioning and analyzing our premises, assumptions, and theories that we have been able to keep moving forward to the benefit of the U.S. economy and consuming public. Perhaps the two key elements to the success of this process have been flexibility and openness. We could not have come as far as we have if the U.S. courts, the antitrust agencies, and the entire antitrust community had not adapted to developments in economic thinking and evolving market realities. Antitrust enforcement must be guided by sound legal and economic principles, and precedent and predictability are critical to any meaningful legal system. But marketplace realities and economic learning are constantly evolving, so it is also critical that we be prepared to modify or abandon practices, rules, and theories when they no longer make sense.

With regard to openness, I cannot stress how important our ongoing public debate has



been to the sound development of antitrust theory and policy. By and large, our system has not developed from the pronouncements of a handful of government theoreticians talking to themselves behind closed doors; rather, it has evolved out of a vibrant and continuous flow of judicial opinions, agency guidelines, and scholarship. It is this open exchange of ideas that has helped us to evolve toward optimal approaches to difficult issues, and enabled us to challenge, and ultimately discard, ill-conceived doctrines or theories lacking in empirical support. The globalization of antitrust in recent decades has only enhanced this process, bringing new minds and fresh ideas to the conversation about antitrust.

**B. The Evolution of Antitrust: An Ever-Increasing Focus on Economics, Efficiency, and Consumer Welfare**

The evolutionary process that antitrust has undergone in the United States over the past century might seem from Brussels to be a patternless patchwork of twists and turns, of theories falling in and out of favor, or of ebbs and flows between more and less activist enforcement. In fact, however, the course of U.S. antitrust over the past decades has been an ever-tightening focus on economic analysis, efficiency, and consumer welfare. It may seem obvious today that antitrust analysis should be guided by sound economics, that it should protect competition rather than competitors, and that it should promote efficiency rather than attempt to "regulate results." But a quick look at the history of American antitrust enforcement shows that these ideas, while always at the core of U.S. antitrust doctrine, have been tested time and again, with each test ultimately reaffirming the wisdom of our core antitrust values.

**1. Discarded Theories**

**a. Shared Monopolies**

Perhaps the best evidence of this is the number and significance of certain antitrust theories and approaches that, like *Tyrannosaurus rex*, dominated the landscape in their day, but happily have disappeared. The “shared monopoly” matters of 30 years ago spring immediately to mind. In the 1970s, the FTC developed the theory of shared monopoly to attack oligopolies and applied it against the leading competitors in the petroleum and cereal industries. The Department of Justice followed, investigating literally dozens of industries using the theory under Section 2 of the Sherman Act. Both agencies applied a purely structural approach to these matters, focusing not on specific unlawful conduct, but on entire markets that had evolved into tight oligopolies. Fortunately, these initiatives -- which could have led to radical and pernicious restructuring in a number of industries -- were short-lived, because the agencies eventually realized that they had not developed, and were not likely to develop, hard evidence that would convince U.S. courts that the shared monopoly theory could be reconciled with the jurisprudence and economic rationale of the antitrust laws.<sup>5</sup>

#### **b. Conglomerate Mergers**

The evolution of antitrust can also be seen in our approach to conglomerate mergers. During the ten-year period from 1965 to 1975, the United States experienced a wave of conglomerate mergers, and a number of them were challenged by the U.S. antitrust agencies. In one of these cases, *FTC v. Procter & Gamble Co.*,<sup>6</sup> the United States Supreme Court embraced a

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<sup>5</sup>See also, Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & Econ. 1, 1-9 (1973) (explaining that simply observing that an industry displays both high concentration and high profit rates does not allow one to conclude that the industry is behaving less competitively, because such market factors are equally consistent with the possibility that certain firms may have superior skills in producing and marketing the product in question).

<sup>6</sup> 386 U.S. 568 (1967).

theory of competitive harm called "entrenchment." Under this entrenchment doctrine, mergers could be condemned if they strengthened an already dominant firm through greater efficiencies, or gave the acquired firm access to a broader line of products or greater financial resources, thereby making life harder for smaller rivals. The *Procter & Gamble* decision led to a number of other cases invoking this theory.<sup>7</sup> These cases stimulated a critical examination, and ultimate rejection, of the theory by legal and economic scholars who argued that the efficiencies that resulted from conglomerate mergers frequently left consumers better off. This persuaded both the Department and the FTC in 1982 explicitly to abandon entrenchment as a basis for challenging non-horizontal merger cases.<sup>8</sup> The abandonment of the *Procter & Gamble* entrenchment theory in the United States was a clear step forward in the application of sound economic thinking to merger enforcement and of rigorous application of the principle that antitrust laws protect competition, efficiency and consumer welfare rather than individual competitors.

**c. Per Se Treatment of Vertical Restraints  
and Certain Tying Arrangements**

The evolution of antitrust can also be seen in the area of vertical restraints. Until the 1970s, the Supreme Court used *per se* rules to ban a wide variety of vertical business arrangements, such as where a manufacturer assigned exclusive territories or allocated customers among its distributors.<sup>9</sup> This broad ban of vertical relationships stirred all sorts of debate in

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<sup>7</sup>See, e.g., *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 70 (10th Cir. 1972); *Allis-Chalmers Mfg. Co. v. White Consol. Ind.*, 414 F.2d 506, 578 (3d Cir. 1969); *General Foods v. FTC*, 386 F.2d 936, 943-46 (3d Cir. 1967).

<sup>8</sup>By the mid-1970s, the courts also seemed to have abandoned this theory. See *Emhart Corp. v. USM Corp.*, 527 F.2d 177 (1st Cir. 1975); *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851 (2d Cir. 1974).

<sup>9</sup>See e.g., *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

antitrust circles, because of its tendency to prohibit demonstrably efficient and procompetitive modes of distribution. By the mid-1970s, a consensus began to emerge that many vertical restraints were procompetitive and that the *per se* rules against them were overly broad. The pivotal event was the Supreme Court's decision in *Continental T.V. Inc. v. GTE Sylvania*,<sup>10</sup> which held that non-price vertical restrictions were to be evaluated under the rule of reason. The Court's decision was explicitly based on the new economic thinking, and on the recognition that certain restraints can intensify interbrand competition and thereby promote efficiency and consumer welfare. These principles are still in the process of refinement today, as evidenced by the Court of Appeals decision last year in *United States v. Microsoft*, which held that applying a *per se* rule against the technical tying of Windows and Internet Explorer could lead to a perverse result in which very real efficiencies would be ignored and tying that benefitted consumers would be forbidden.<sup>11</sup>

**d. Excessively Harsh Treatment of Horizontal Mergers**

The evolution of antitrust can also be seen in our treatment of the "bread and butter" of civil antitrust enforcement -- horizontal mergers. During the 1950s and 1960s, antitrust agencies and courts feared market concentration at even low levels. The decisions of this era relied rigidly on market share statistics and also were affected by a variety of other non-economic values, such as preserving small firms, preserving a large number of competitors, and maintaining consumer choice. For instance, in *Brown Shoe Co. v. United States*,<sup>12</sup> the Supreme Court prohibited a

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<sup>10</sup> 433 U.S. 36 (1977).

<sup>11</sup> *United States v. Microsoft*, 253 F.3d 34, 77-86 (D.C. Cir. 2001).

<sup>12</sup> 370 U.S. 294 (1962).

merger where the parties held only 5% of the relevant market and also held that preserving small firms was a factor to be considered in merger cases. Later, the Court invalidated mergers in *United States v. Von's Grocery Co.*,<sup>13</sup> and *United States v. Pabst Brewing Co.*,<sup>14</sup> where the parties' combined market shares were as low as 7% and 4.5%, respectively.

Over time, economic research seriously undermined fears of low market share mergers and questioned the overly simplistic reliance on market structure as the both the beginning and end of competitive analysis. These new concepts were embraced by the Supreme Court in *United States v. General Dynamics*,<sup>15</sup> where the Court held that high market shares alone were insufficient to block a merger and required a deeper inquiry into the actual, future competitive effects of a merger. This landmark decision moved the enforcement agencies and the lower courts in the right direction, causing them to integrate sound economic principles into their decisions to a much greater extent than before. Naturally, concepts such as ease of entry and efficiencies began to work their way into antitrust analysis, leading to the Department's landmark 1982 Merger Guidelines, which integrated those concepts into a framework that has become the preferred analytical framework for merger review in the United States and, indirectly, in many countries around the world. Today, no U.S. enforcement agency or court would think of rejecting a merger solely based on structural presumptions from small increases in concentration, much less because the merger might endanger small firms.

## **2. "The Right Stuff": The Evolution to Economically Sound Enforcement**

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<sup>13</sup> 384 U.S. 270 (1966).

<sup>14</sup> 384 U.S. 546 (1966).

<sup>15</sup> 415 U.S. 486 (1974).

## **Policies**

One thing that seems clear after reviewing this list of antitrust theories that have been embraced and then discarded is that there has been a consistent trend over the last thirty years towards an increasing focus on economics, efficiency and consumer welfare. By remaining sufficiently flexible to incorporate the latest in economic thinking into our analysis, we have now refined our enforcement policies to the point where we are better able than ever to target transactions and practices that the antitrust laws are meant to address. In my view, four key factors have enabled us to maintain our focus on the “right stuff” over the past few decades. These are: participation by the courts; an increased focus on efficiencies; issuance of the 1982 Merger Guidelines; and the increasing role of economists in agency investigations and decisionmaking.

### **a. Participation by the Courts**

The landmark decisions in *GTE Sylvania* and *General Dynamics*, as well as numerous others at all levels of the federal judiciary, demonstrate the critical role that the courts have played in shaping antitrust doctrine into what it is today. I have already extolled the virtues of flexibility and an openness to new ideas. But flexibility cannot go unchecked. In the United States, even though the enforcement agencies have broad discretion in deciding which cases to bring, ultimately those cases must be proven before an independent fact-finder. Not only have our courts been an important disciplining device on agency initiatives over the years, but they also have provided a vehicle for exchanging ideas on where antitrust should be. Justices and judges have been willing to think hard about the issues and arguments central to antitrust, and their work has done much to shape antitrust law and policy and to keep us moving in the right direction.

Independent judicial review by courts of general jurisdiction provides an important check on the sometime insularity of the antitrust community and the possibility that agency officials may become intoxicated with their own thinking, a phenomenon I refer to as “drinking one’s own wine.” Courts, with their focus on evidence and their grounding in the technical requirements of the law, subject our antitrust theories to a true test of merit.

**b. Issuance of the 1982 Merger Guidelines**

As I have already noted, courts and enforcement agencies have increasingly made use of the latest economic thinking, often to modify or discard faulty theories or approaches. However, the "modern era" really began for the Department of Justice in 1982 when AAG Bill Baxter released the Department’s new Merger Guidelines, a document that incorporated economics into antitrust to a greater extent than ever before. The new Guidelines transformed merger enforcement: they provided a clear analytical framework for businesses and antitrust practitioners that was both workable and economically sound. Perhaps most importantly, the Guidelines established beyond any doubt that antitrust enforcement would be guided by economics, with a focus on preserving competition and consumer welfare. Although modified and improved over the years, the principles behind the 1982 Guidelines continue to form the bedrock of modern-day merger enforcement.

In the United States, guidelines themselves have been subjected to market tests. The Baxter Guidelines of 1982 found broad acceptance because they reflected a broad policy consensus and were grounded in the relevant jurisprudence. By contrast, a “competing” set of merger guidelines published by the National Association of Attorneys General was a polemic attempt to turn back the clock to the 1960s by rejecting the focus on economics and strengthening

structural presumptions.<sup>16</sup> Those guidelines have not won general acceptance, and seldom have been cited, even in cases brought by the states themselves. This result shows that, in order to be meaningful, agency guidelines must reflect sound analytical principles.

**c. Increased Focus on Efficiencies**

The evolution of our thinking on efficiencies is, in effect, much like the evolution of antitrust itself. For much of the 20th century, U.S. court decisions ignored or downplayed efficiencies or even treated them as part of an anticompetitive effect, since they made it more difficult for other competitors to successfully compete. The increasing use of economics in antitrust, and the realization that competition is enhanced when a firm improves its efficiency, even if competitors are harmed, caused a gradual recognition through the 1970s, 1980s, and 1990s that efficiencies could be an important part of merger review. Our Merger Guidelines now explicitly recognize that merger-generated efficiencies can enhance competition and that the marginal cost reductions generated by efficiencies may make coordination less likely or reduce incentives to raise price unilaterally. In these and other market situations, efficiencies are likely to lead to benefits to consumers.

**d. Increasing Role of Economists at the Agencies**

Finally, our economic approach to antitrust enforcement is not merely a matter of improvements in doctrine; it is also a matter of changes in institutional structure. During most of the Justice Department's history, the professional staff was essentially all attorneys, and economic analysis predictably tended to take a back seat to legal precedent, regardless of the economic

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<sup>16</sup> NAAG Horizontal Merger Guidelines, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,406 (1993).



context. In 1973, however, the Department created the Economic Policy Organization in order to give economists a clear role in policy and case analysis.<sup>17</sup> The role of economists within the Department has continued to grow over the past 30 years. Today, the Department employs nearly 60 highly-qualified Ph.D. economists in its Economic Analysis Group, and at least one staff economist is assigned to every civil investigative staff. Our economists are an integral part of our investigations from beginning to end, and it is impossible for me to imagine the Department operating without them. Indeed, we continually are evaluating our review processes to ensure that economists are involved, not just in the decisionmaking functions of the Department, but in all phases of our inquiries. Our integration of economists and economic thinking into the Department parallels what goes on in the wider U.S. antitrust world: courts, private practitioners, and law schools routinely integrate economists and economic thinking into their respective endeavors.

Over the years, economists also have played an increasingly critical role in the U.S. as expert witnesses in litigated antitrust cases. Antitrust matters are often complex, and these experts can significantly enhance a court's understanding of the key economic theories, issues, and predictions on which a case may turn. The enhanced importance of expert economic testimony in antitrust trials is, of course, a natural outgrowth of our recognition that the antitrust laws must be applied with economic rigor. While generally a positive development, we must be careful not to ask too much of these experts. Antitrust cases also turn largely on the particular

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<sup>17</sup>See Thomas E. Kauper, *The Role of Economic Analysis in the Antitrust Division Before and After the Establishment of the Economic Policy Office: A Lawyer's View*, 29 Antitrust Bulletin 111 (1984) (Mr. Kauper, who was Assistant Attorney General for the Antitrust Division at the time, discusses the considerations that went into establishing the Economic Policy Organization).

facts, and antitrust trials yield the best results when we leave the facts to witnesses who have first-hand knowledge of them and keep expert testimony focused on the economic analysis and conclusions that can be drawn from the facts.

**e. Summing Up**

Although the evolutionary process in U.S. antitrust law may never be complete, we have come a long way over the past hundred years, not least because of the creative tension between the theory-testing enforcement role of the antitrust agencies and the role of our courts as vigorous arbiters of the law. Our experience has taught us the benefits of an evolutionary process, and one that relies on flexibility and an open exchange of ideas. No responsible person would still want to be operating under an antitrust regime based on the economic theories of the 1960s, much less the 1890s. Because economics is itself a field that changes and progresses over time, the law itself must incorporate the same kind of flexibility. Moreover, sound economics are not a matter of geography: the same principles ought to hold true whether one is in Newark, New Jersey, or Newark, England. It therefore should come as no surprise that the same processes that are at work in the United States can also be seen at work in the European Union.

**IV. The Recent Evolution of EU Antitrust Law**

For its part, the European Commission has, under Commissioner Monti's leadership, been remarkably open to reform of its antitrust regime and willing to consider improvements in response to changes in the European and global economies, advances in economic understanding, and increased sharing of enforcement experience with the United States and others. As Director General Alexander Schaub stated at Fordham last October, "Convergence is an organic process

that grows out of learning from each other's experience, allowing all of us to retain the best elements. In a globalizing world it is important to take an open-minded approach and constantly consider whether one's own rules and practices can be improved."<sup>18</sup>

A critical element of the current reform of EU competition policy, similar to the revolution in U.S. antitrust thinking that I described above, is an increased attention to economic analysis and a focus on consumer welfare. Again, to quote Dr. Schaub, the aim of all ongoing EU antitrust reforms "is the same: a more economic approach based on market realities and quite particularly on the power of the parties to harm competition to the detriment of consumers."<sup>19</sup> Convergence in this area between the U.S. and the EU has been quite impressive; as Commissioner Monti said last year, "We can confidently say that we share the same goals and pursue the same results on both sides of the Atlantic: namely, to ensure effective competition between enterprises, by conducting a competition policy which is based on sound economics and which has the protection of consumers as its primary concern."<sup>20</sup> We have also been impressed by Commissioner Monti's commitment to hiring professional economists and enhancing their operational role in DG-COMP. As discussed above, the U.S. antitrust agencies went through a similar process during the late 1970s and early 1980s, and our economists are fully integrated in all steps of our enforcement process.

Indeed, Commissioner Monti is vigorously pursuing the modernization of the EC's

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<sup>18</sup>Alexander Schaub, "Continued Focus on Reform - Recent Developments in EC Competition Policy," Speech at Fordham Corporate Law Institute (Oct.25, 2001).

<sup>19</sup>*Id.*

<sup>20</sup>Mario Monti, "Antitrust in the US and Europe: a History of Convergence," ABA General Counsel Round Table (Nov.14, 2001).

antitrust regime on a broad front. The proposal he announced in September 2000<sup>21</sup> would, by abolishing the notification system and reallocating enforcement among the Commission and member state authorities, reduce administrative burdens on business and at the same time free scarce Commission resources for the essential mission of combating hard core cartels operating at the Community and global level. An enhanced cooperative network among national antitrust authorities should also improve enforcement cooperation and information sharing among them and further the common commitment to sound competition policy within the EU and around the world. The modernization program also includes important proposals that would provide effective enhancements to the Commission's investigative powers (such as the taking of oral statements from witnesses) and to the Commission's ability to enforce its powers when necessary (fines for breaches of procedural rules and periodic penalty payments). In our experience, such powerful enforcement tools are necessary, especially when dealing with cartels that operate in secrecy.

I have heard criticisms by European counsel of some of these reforms, which echo what some American lawyers said 20 years ago about the economic revolution in American antitrust. Of course, Europeans have to decide for themselves how they want to proceed on these issues. But apparently, there are people who prefer doing what they have always done over embracing change — that is, people who, for example, find the bureaucratic certainty of exemption letters preferable to having to figure out for themselves the competitive consequences of their clients' actions. And there are lawyers who despair of performing a rule of reason-based economic analysis of transactions -- and even, I suspect, some who shrink at the prospect of talking, or

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<sup>21</sup>Proposal for a Council Regulation on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty and Amending Regulations (EEC) No. 1017/68, (EEC) No. 2988/74, (EEC) No. 4056/86, and (EEC) No. 3975/87, COM (2000) 582 final (Sept. 27, 2000).

listening, to economists. But our own antitrust bar eventually came to terms with the economic basis of antitrust, and I suspect that these naysayers will too.

Another area where the Commission is undertaking significant reform is merger review. The Green Paper published last December<sup>22</sup> initiated a wide ranging review of the EU's Merger Control Regulation. It commits the EU to consider whether to move from its dominance standard to the possibly more "economically-based analysis" of the "less legally rigid" substantial lessening of competition test and whether to alter the role and scope of efficiencies in merger analysis. With respect to efficiencies, we obviously support Commissioner Monti's statement last year that "[W]e are not against mergers that create more efficient firms. Such mergers tend to benefit consumers, even if competitors might suffer from increased competition."<sup>23</sup> Our agencies are coming to take the same positive view of merger-generated efficiencies and will not challenge a merger just because it creates a more efficient firm and thereby benefits consumers, even if competitors might suffer from the increased competition.

The Green Paper also proposes modifications in the merger process that would reduce the burden on notifying parties, such as expedited procedures for obviously harmless transactions, and it tackles difficult jurisdictional issues involving allocation of responsibilities between the Commission and member states, all of which also would have important effects on business certainty and notification burdens. Further, the Green Paper addresses procedural issues, including additional time periods for review of proposed commitments by the parties, enhanced

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<sup>22</sup>Green Paper on the Review of Council Regulation (EEC) 4064/89, COM (2001) 745/6 final (Dec.11, 2001).

<sup>23</sup>Mario Monti, The Future for Competition Policy in the European Union, Address at Merchant Taylor's Hall, London (July 9, 2001).

investigatory powers (*e.g.*, the use of oral witness statements) and increased fines for breaches of procedural rules. Finally, the Green Paper raises questions that concern businesses on both sides of the Atlantic about certain due process issues, such as the adequacy of judicial review in Commission merger proceedings.

In the crucial fight against hard core cartels, the commitment of Commissioner Monti and his staff has been impressive. In 2001 alone, the Commission imposed substantial fines amounting to a total of 1.8 billion euros (about \$1.6 billion) against nearly 60 European and foreign firms. (Many of these cartels were prosecuted in the U.S. as well.) Not only did these fines exceed those imposed in any previous year, they were larger than the *total* fines imposed between the creation of the EC and the year 2000.<sup>24</sup> We also commend the Commissioner's leadership this year in securing the Commission's recent adoption of a more effective corporate leniency program.<sup>25</sup> These changes are an important step in the direction of greater transparency and predictability. They will substantially enhance the incentives to come forward by making a grant of full immunity automatic for the first company to qualify if the Commission was previously unaware of the violation.

Another important area of ongoing reform relates to the relation between antitrust and intellectual property. In the EU, the licensing of intellectual property has been governed by the

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<sup>24</sup>European Commission press release of February 13, 2002, IP/02/247, Commission Adopts New Leniency Policy for Companies Which Give Information on Cartels.

<sup>25</sup>Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, O.J. C 45, pp. 3-5 (February 19, 2002).

Commission's 1996 Technology Transfer Block Exemption (TTBE).<sup>26</sup> As the Commission notes in its Evaluation Report on reform of the TTBE, the block exemption "is based on the traditional white, grey and black list approach, stipulating what is allowed, what may be allowed, and what is not allowed. No account is taken of the market position of the parties. This form-based and legalistic approach is at odds with [the Commission's] new block exemption regulations in the field of vertical restraints and of horizontal cooperation agreements. . . . The market power based approach is more flexible and in line with economic reality."<sup>27</sup> Consistent with the approach taken in the 1995 DOJ/FTC intellectual property guidelines,<sup>28</sup> the Commission's review of the TTBE recognizes that the "time has come to draw a clear distinction between licensing involving competitors and licensing between non-competitors."<sup>29</sup> The Commission is again suggesting an approach based on sound economic analysis of the competitive effects of intellectual property licensing.<sup>30</sup>

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<sup>26</sup>Commission Regulation (EC) 240/96 on the Application of Article 81(3) of the Treaty to Certain Categories of Technology Transfer Agreements, O.J. L 31, pp. 2-13 (December 9, 1996).

<sup>27</sup>Commission Evaluation Report on the 1996 Transfer of Technology Block Exemption, December 2001, at paras 3-4.

<sup>28</sup>Antitrust Guidelines for the Licensing of Intellectual Property issued by the U.S. Department of Justice and the Federal Trade Commission (April 6, 1995).

<sup>29</sup>Alexander Schaub, Continued Focus on Reform - Recent Developments in EC Competition Policy, Speech at Fordham Corporate Law Institute (October 25-26, 2001).

<sup>30</sup>The Evaluation Report states that:

"The TTBE is form-based and follows a legalistic approach similar to the one followed in the past by the Commission in the field of vertical and horizontal agreements. ... Its focus is mainly on intra-brand competition and market integration. This raises the question whether the TTBE has imposed on industry a straitjacket forcing companies unduly to enter into agreements limiting their effectiveness and possibly limiting the competitiveness of the European industry. The recent reforms of the EC competition rules in the field of vertical and horizontal agreements have signified

Not coincidentally, the Department of Justice and the FTC are currently holding a wide-ranging series of hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, in order to study many of these same important issues. Commission witnesses are scheduled to participate in these hearings next week. We and our EU counterparts have taken note that intellectual property and antitrust law share the common purpose of promoting dynamic competition and thereby enhancing consumer welfare. These property rights reward innovation and creativity by eliminating certain forms of imitation and unauthorized use through the creation of enforceable property rights in new products and processes and original works of expression. Antitrust law, in turn, promotes dynamic competition and consumer welfare by prohibiting certain conduct by market participants that unreasonably constrains the competitive process.

More than ever before, the creation and dissemination of intellectual property is the engine driving economic growth and consumer satisfaction. Consequently, as antitrust law addresses the competitive implications of conduct involving intellectual property, and as intellectual property law addresses the nature and scope of intellectual property rights, we must take care to maintain proper incentives for the innovation and creativity on which our economies depend. A healthy respect for intellectual property rights will promote, not diminish, competition. Antitrust can reinforce that respect by assuring that intellectual property rights are not overasserted or abused

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a shift from a legalistic and form-based approach to a more economic and effects-based approach, focusing more on inter-brand competition issues and on the analysis of possible efficiencies of certain restrictions. This was accomplished amongst others by the use of market share thresholds, the elimination of lists of white and grey clauses in the relevant Block Exemption Regulations and by the formulation of Guidelines.”

Guidelines on Vertical Restraints, O.J. C 291, pp. 1-44 (Oct.13, 2000).



in ways that harm competition and injure the intellectual property rights of others. Consistent with our simultaneous consideration of issues at the intersection of intellectual property and antitrust, the U.S. agencies are discussing with our EU counterparts how we can enhance our level of consultation on these issues.

One final aspect of European reform that should be mentioned is the consistent effort of Commissioner Monti and DG-COMP in promoting competition across the board, throughout all phases of the work of the European Commission. This role is anchored, of course, in the vision of the founders of the European Economic Community, who set forth as a fundamental principle for the Common Market “a system ensuring that competition in the internal market is not distorted.”<sup>31</sup> In recent years DG-COMP’s efforts have paid off by ensuring that the benefits of competition are reflected in the Commission’s broad legislative programs in telecommunications, energy, transportation, and other sectors. We warmly applaud this competition advocacy mission, which is something we value greatly in our own work in the United States, and which should be central to the work of all antitrust authorities.

To return to where I began this discussion of antitrust reform in the EU, the Commission’s recent actions and proposed actions on all of these matters are splendid examples of the spirit of frank exchanges of view and openness to change that should characterize an antitrust policy based on sound economics. I urge you here today, Commission officials, businesspeople, and members of the legal and academic community, closely to scrutinize what we antitrust enforcers do, and to work with us and the Commission to help maintain our focus on the core values of antitrust.

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<sup>31</sup>Treaty Establishing the European Community, Article 3(1)(g).

## V. Meeting the Challenge of Multijurisdictional Antitrust Enforcement

The ancient Greek physician Hippocrates is famous for some advice that antitrust enforcers should constantly keep in view: “First, do no harm.” But Hippocrates said something else that is relevant to our discussion today: “Healing is a matter of time, but it is sometimes a matter of opportunity.”<sup>32</sup> We live in a world where certain aspects of multijurisdictional merger enforcement pose risks to the health of the global economy, and I believe we should seize this opportunity to minimize those risks at an early stage.

Many international organizations are looking at antitrust issues these days, including the United Nations Conference on Trade and Development, the World Trade Organization, and the Organization for Economic Cooperation and Development, whose Competition Committee is doing very useful work to promote convergence in the merger review process among its members. “Convergence” is the key concept here. No one seriously believes that the world is ready for a global antitrust code enforced by a global antitrust agency, nor has there been nearly enough convergence to justify the imposition of dispute settlement-based antitrust disciplines in trade agreements, in the WTO or elsewhere. The risks of sterile conflict and politicization of antitrust enforcement remain too great. So I would like to conclude my remarks today by discussing two unusual, and perhaps unique, exercises that focus precisely on promoting antitrust convergence -- the U.S.-EU Merger Working Group and the International Competition Network.

Last September, the U.S. antitrust agencies and the European Commission agreed to devote substantial resources to reinvigorate our existing joint working group to speed the process of convergence across the ocean. (The group previously had completed some useful work in the

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<sup>32</sup> Hippocrates, *Precepts*, ch. 1.

area of merger remedies.) Our working group is currently is in the process of examining three issues: (1) merger process and timing; (2) conglomerate mergers; and (3) the role of efficiencies in merger analysis. The Department, the FTC, and DG-COMP have many lawyers and economists working together on these issues, proceeding largely by videoconferences supplemented by some in-person meetings.

We will complete work in some of these areas, and make significant progress on others, by the time of our next bilateral meeting. I anticipate that on some of these issues, we will make appreciable progress toward procedural or substantive convergence, and on others we will at least achieve a better understanding of our differences. My expectation is that the mergers working group will take on new issues in the coming year. Indeed, it might be useful to create working groups on other important subjects, such as the relationship between antitrust and intellectual property, so that the U.S. and EU agencies can move forward together on these issues.

Convergence, of course, is not an end in itself. We are not interested in wasting time and resources creating some sort of lowest-common-denominator “convergence” that solves no practical problems and contributes nothing to sound antitrust enforcement. Rather, we want to ensure that antitrust enforcement around the world follows sound processes and is based on the bedrock principle that antitrust protects competition, and not competitors. I believe that the new International Competition Network (ICN) offers real promise of achieving this goal.

Last October, I was fortunate to be among the senior antitrust officials from 14 jurisdictions, including the European Commission, who created a new framework within which antitrust agencies from developed and developing countries will formulate and develop consensus positions on specific proposals for procedural and substantive convergence in antitrust

enforcement The ICN will be “all antitrust, all the time.”

Under the leadership of Canada’s Konrad von Finckenstein, Chair of the ICN’s Interim Steering Group, and with Commissioner Monti’s enthusiastic support, this new network has made a good start. Already, 60 jurisdictions on six continents have joined the ICN; these jurisdictions represent roughly three-quarters of the world’s Gross Domestic Product. A great attraction and distinguishing feature of the ICN is that it is a “virtual network,” flexibly organized around geographically diverse working groups, which work together largely by Internet, telephone, fax, and videoconference. This work methodology permits frequent, informal, and low-cost discussions that have obvious advantages over the periodic formal meeting structure of more traditional organizations. (There are, of course, disadvantages: calls involving people in Mexico City, Rome, Pretoria, Seoul, and Sydney cannot be made at times that are even roughly convenient for everyone concerned.) Regular and focused interaction among scores of antitrust authorities will promote sound antitrust policies and procedures around the world.

The ICN has another unusual feature: the private sector is playing a very important role in it. Members of the private bar on both sides of the Atlantic, businesspeople, academics, and representatives of international organizations (including OECD) are working with us side-by-side on each of the projects ICN undertakes, giving us -- and our work product -- the benefit of their knowledge, experience, and insights. Diversity in points of view will be crucial in developing ICN recommendations, because we want any recommendations ICN makes not only to be sound, but to have a broad legitimacy in the global community.

ICN’s goal is to contribute to global antitrust convergence by developing guiding principles and best practice recommendations to be endorsed, and then implemented voluntarily, by member

agencies. Many jurisdictions share our concern about the issues raised by multijurisdictional merger reviews, so one of ICN's first projects is an examination of the multijurisdictional merger review process. (The other is the role of competition advocacy by antitrust agencies in emerging economies.) The mission of ICN's Merger Review Working Group, which is chaired by one of my Deputies, Bill Kolasky, is to promote the adoption of best practices in the design and operation of merger review regimes in order (1) to enhance the effectiveness of each jurisdiction's merger review mechanisms; (2) to facilitate procedural and substantive convergence; and (3) to reduce the public and private time and cost of multijurisdictional merger reviews. Initially, the Working Group is concentrating on three areas: merger notification and review procedures; the analytical framework for merger review; and investigative techniques for merger review.

We hope to have important progress to announce or insights to share on all of these subjects, and on competition advocacy as well, by the first ICN conference, in late September in Naples. We do not expect to achieve convergence on all merger issues in the first year, or even the second or third. Rather, ICN members expect to maintain a continuous, collegial, and focused dialogue and to achieve meaningful improvements in the practice of international antitrust enforcement, one step at a time, over both the short and long terms.

## **Conclusion**

At the beginning of the 21<sup>st</sup> century, we in the antitrust community need to work very hard to achieve a substantial degree of worldwide convergence on antitrust substance and process, based on the core value of protecting competition and promoting economic efficiency. The

evolutionary history of antitrust in the U.S. and EU, and the goodwill and cooperative spirit among our agencies shows that this is an achievable goal. Instruments like the ICN promise to provide the means to achieve that goal.

Moving beyond our good faith efforts at cooperation and convergence will be difficult because it will require some combination of mutual respect and mutual restraint. In a world of overlapping jurisdictions, we already know that multiple agencies have the authority to act with respect to particular transactions or conduct. The open questions facing each authority, therefore, are should we act and how. We have, to recall Hippocrates, an opportunity to heal serious weaknesses in the process of antitrust enforcement to which many of us have devoted our professional lives. We must seize this opportunity.